

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of)
)
 Amendment of Section 73.606(b))
 Table of Allotments,)
 Television Broadcast Stations)
 (Bath, New York))
)
 Amendment of Section 73.622(b))
 DTV Table of Allotments)
 Digital Television Broadcast Stations)
 (Syracuse, New York))

APR 22 2004

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

MM Docket No. _____
 RM- _____

To: The Commission

REPLY TO OPPOSITION

Paxson Syracuse License, Inc. ("Paxson"), licensee of commercial television station WSPX-TV, Syracuse, New York, by its attorneys and pursuant to Section 1.115(d) of the Commission's rules,¹ hereby files this Reply to the Opposition to Application for Review of William H. Walker III ("Walker"), applicant for a new analog television station on Channel 14 in Bath, New York (the "Opposition").² Walker offers no policy or legal support for the Bureau's erroneous decision to dismiss the above-referenced Petition for Rulemaking (the "Petition") or the Commission's similarly flawed decision in *Muskogee*.³ Sound spectrum management and

¹ 47 C.F.R. § 1.115(a).

² See FCC File No. BPCT-19870331LW (the "Bath Application"). This Reply is timely filed pursuant to Sections 1.4(b) and 1.115(d) of the Commission's rules. 47 C.F.R. §§ 1.4(b), 1.115(d).

³ Muskogee, Oklahoma, *Memorandum Opinion and Order*, FCC 03-321 (rel. March 2, 2004), *reconsideration pending* ("Muskogee").

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DTV transition policy require that the Commission reverse the Bureau and order reinstatement of the Petition.

Walker ignores the core public interests implicated by the Bureau's dismissal of the Petition and by the Commission's decision in *Muskogee*. As Paxson showed in its Application for Review, permanently depriving single-channel analog broadcasters of paired digital allotments will substantially undermine the DTV transition.⁴ Single-channel analog broadcasters like WSPX-TV (and, incidentally, like the Bath Applicant would be if its pending application is granted) present difficult obstacles to the completion of the DTV transition in any market where they are present.

Congress requires that the DTV transition cannot end in any market until 85% of viewers in that market can receive DTV signals from all local broadcasters either over-the-air or through a multi-channel video provider.⁵ This standard can be satisfied in markets with single-channel analog broadcasters only if the Commission forces these broadcasters to convert to DTV before the transition is complete. Such a course, however, would contradict significant Commission precedent that (1) supports single-channel broadcasters' right to operate in analog until the close of the DTV transition⁶ and (2) guards against the elimination of relied-upon television service.⁷

⁴ Application for Review at 5-7.

⁵ See 47 U.S.C. 309(j)(14)(B).

⁶ See, e.g., Remedial Steps for Failure to Comply with Digital Television Construction Schedule, 18 FCC 7174, n. 25 (2003); Rcd Advanced Television services and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, 6865 (1998). Stations also are permitted to "flash-cut" to DTV service on their analog allotment upon Commission approval.

⁷ See, e.g., *West Michigan Telecasters, Inc. v FCC*, 460 F.2d 883 (D. C. Cir. 1972) (losses in service are *prima facie* inconsistent with the public interest and must be supported by a strong showing of countervailing factors). Thus, the Bath Applicant's argument that the Commission "awards a heavy preference for a first broadcast outlet to a community" is trumped by the fact

Walker claims that the Commission's preference for new service tips the scales in favor of its Application,⁸ but plainly the presumption against proposals resulting in loss of service is applied even more aggressively than that favoring first area services.⁹ Walker also incorrectly claims that denial of the Petition will result in no service diminution in the Syracuse market.¹⁰ There is no question that early digital conversion of WSPX-TV – either at the Station's option or by Commission command – will deprive viewers of relied-upon analog service, and there is likewise no dispute that permitting paired allotments would preserve current levels of service to all viewers. The only way to avoid disenfranchising numerous over-the-air broadcast viewers is by allotting paired channels to single channel analog stations like WSPX-TV.

Furthermore, rejecting all paired allotment requests will undermine the Commission's policy of encouraging rapid introduction of DTV by requiring as many DTV stations as possible to go on the air as quickly as possible.¹¹ In this case, for example, Paxson has stated that it will place WSPX-DT into operation expeditiously.¹² Paxson already has established a track record of constructing over 40 DTV stations, so the Commission can be sure that WSPX-DT will be

that even greater importance is accorded to protecting against the loss to the public of existing broadcast service.

⁸ Opposition at 3-4.

⁹ Walker's citation to Section 307(b) is unavailing because allotment of channel 14 to WPXS-TV plainly would be more consistent with the language of the statute and the Commission's allotment priorities than leaving the spectrum fallow, as it has been for the past 17 years, or granting operating authority to an additional analog-only broadcaster.

¹⁰ Opposition at 4.

¹¹ See Remedial Steps For Failure to Comply With Digital Television Construction Schedule; Requests For Extension of the October 5, 2001, Digital Television Construction Deadline, *Order And Notice Of Proposed Rulemaking*, 17 FCC Rcd 9962, ¶ 16 (2002) (adopting sanctions for failure to timely construct DTV stations); Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594, ¶¶ 34-36 (allowing DTV stations to commence operations at low power).

operational within a reasonable time of grant. Walker, on the other hand, offers only that it will build its analog facilities when its application is granted. An additional analog channel in southern central New York will do nothing to further the Commission's policy favoring rapid introduction of DTV. Such a course will only deepen the dependence of Bath residents on analog television and create yet another broadcaster with a vested interest in delaying initiation of DTV service and the end of the DTV transition for as long as possible. These are the natural and logical consequences of the Bureau's resolution of this case and the Commission's decision in *Muskogee*, and they are directly at odds with the Commission's DTV transition policies.

Conversely, granting paired allotments in cases where spectrum is available will advance the DTV transition by giving consumers reason to purchase digital receivers – one of the critical metrics in the success of the DTV transition, the recovery of analog spectrum, and the ultimate success of DTV broadcasting.¹³ Consequently, grant of the petition would serve the particularly strong public interest of facilitating an accelerated DTV transition without compromising any existing service.¹⁴

Despite Walker's protests, there is no legal authority that compels the Commission to dismiss the Petition.¹⁵ The Commission's decision not to allot paired channels to requesting broadcasters in the *Fifth Report and Order* applied only to *initial* DTV allotments and did not foreclose subsequent requests for paired channels.¹⁶ As Paxson showed in its Application for

¹² Petition at 9-10.

¹³ The DTV transition will end when 85% of the market is capable of receiving digital signals. See 47 U.S.C. 309(j)(14)(B).

¹⁴ Moreover, as Paxson has shown, granting the Petition would not necessarily deny Walker a new station serving Bath, New York, nor delay service to Bath. Petition at 8.

¹⁵ Opposition at 2-4.

¹⁶ Petition at 5-6.

Review, the Bureau's decision in this case and the Commission's decision in *Muskogee* go beyond the Commission's ruling in the *Fifth Report and Order* and represent an improper alteration of the Commission's rules without notice and comment rulemaking in contravention of the Administrative Procedure Act.¹⁷ This improper policy change is especially inappropriate because the conditions that prevailed in 1997 have changed dramatically, and each of those changes counsels against denying paired channel requests.¹⁸ Walker offers no theory to support the Commission's unnoticed rule changes or to explain how this interpretation could be correct in light of the changed circumstances that have challenged the Commission's assumptions in the *Fifth Report and Order*.

Walker's citation to *Community Television Inc. v. FCC*¹⁹ is inapposite. In that case, the D.C. Circuit affirmed the Commission's decision to limit *initial* allotments to broadcasters that were on the air or had been granted a construction permit prior to April 3, 1997, but because the Commission's decision did not address subsequent requests like the Petition, the D.C. Circuit's affirmance could not and did not reach that question. The Bureau's ruling in this case and the Commission's ruling in *Muskogee* go far beyond the rulings in the *Fifth Report and Order* that were under review in *Community Television*, and neither Walker nor the Commission can retroactively expand the scope of those proceedings to support their case here.²⁰

The Commission's decision in this case and in *Muskogee* severely impair the chances that the DTV transition will be completed in any market with a single-channel broadcaster by

¹⁷ Application for Review at 2-4.

¹⁸ See *id.* at 5-7; Petition at 4-6.

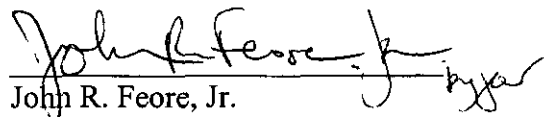
¹⁹ 216 F.3d 1133 (2000) ("*Community Television*").

²⁰ See, e.g., *Opryland U.S.A. Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 854 (Fed. Cir. 1992) (court cannot decide issues that have not been placed before it); *Phillips v. Vasquez*, 56 F.3d 1030, 1039 (9th Cir. 1995) (same).

The Commission's decision in this case and in *Muskogee* severely impair the chances that the DTV transition will be completed in any market with a single-channel broadcaster by Congress's December 31, 2006, target date. The decisions are unsupported by the Commission's prior precedent and fly in the face of the Commission's experience with the DTV transition since it initially denied paired allotments to single-channel analog broadcasters. That experience should counsel the Commission to take the opposite approach by reversing its ruling to the contrary and reinstating the Petition.

Respectfully Submitted,

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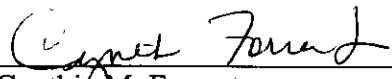
Dated: April 22, 2004

CERTIFICATE OF SERVICE

I, Cynthia M. Forrester, hereby certify that a true and correct copy of the foregoing Application for Review was sent on this 22d day of April, 2004, via First Class U.S. Mail, postage prepaid to the following:

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